Supreme Court, U. S.
FILED
NOV 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL.,
Appellants,

v.

JOHN T. DUNLOP, SECRETARY OF LABOR,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT, STATE OF MARYLAND

FRANCIS B. BURCH,
Attorney General
of Maryland,
HENRY R. LORD,
Deputy Attorney General,
GLENN E. BUSHEL,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
Attorneys for Appellant,
State of Maryland.

November 1975

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
INTRODUCTORY STATEMENT	6
ARGUMENT	6
CONCLUSION	22

TABLE OF CITATIONS

Cases

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837 (1935)	21
Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974)	15
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)	14
Charles E. Brohawn & Bros., Inc. v. Board of Trustees, 269 Md. 164, 304 A.2d 819 (1973)	15
Clover Bottom Hosp. & School v. Townsend, 513 S.W.2d 505 (Tenn. 1974)	15
Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347 (1974)	14

	PAGE
Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 93 S. Ct. 1614 (1973)	14, 15
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)	14
Hughes v. Maryland Committee for Fair Representation, 241 Md. 471, 217 A.2d 273 (1966)	11
Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796)	14
McKeldin v. Steedman, 203 Md. 89, 98 A.2d 561 (1953)	10, 11, 18
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	14
Maryland v. Environmental Protection Agency, No. 74-1007 (4th Cir., decided Sept. 19, 1975)	20
Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017 (1968)	11, 17
Mayor & City Council v. O'Conor, 147 Md. 639, 128 A. 759 (1925)	13
Panitz v. Comptroller of the Treasury, 247 Md. 501, 232 A.2d 891 (1967)	6, 8, 9, 13
Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627 (1967)	16, 17
Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810 (1947)	15
United States v. Carolene Prods. Co., 304 U.S. 144, 58 S. Ct. 778 (1938)	21
United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1941)	21
United States v. Mississippi, 380 U.S. 128, 85 S. Ct. 808 (1965)	16
Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)	14

Constitutions

	PAGE
Constitution of the United States of America:	
Amend. X	19
Amend. XI	16
Constitution of the State of Maryland:	
Art. II, §17	13
Art. II, §21	11
Art. III, §14	12
Art. III, §15(1)	12
Art. III, §32	2, 16
Art. III, §52	2, 9
Art. III, §52(2)	8
Art. III, §52(5)	8
Art. III, §52(5a)	11, 13
Art. III, §52(6)	10, 11
Art. III, §52(8)	8, 11
Art. III, §52(8)(a)	13
Art. III, §52(8)(b)	13
Art. III, §52(8)(d)	13
Art. III, §52(14)	10
Art. IV, §§2, 3	16

Statutes

Federal:	
28 U.S.C. §1253	1
29 U.S.C.:	
§206	13
§207	14
§215(a)(2)	13
§216(a)	13, 14
§216(b)	13, 14
§216(c)	16

PAGE

Act of August 27, 1935, 49 Stat. 872 (1935) 20

National Prohibition Act (Volstead Act), 41 Stat. 305 (1919) 20

Miscellaneous

Brennan, *Extension of the Bill of Rights to the States,* 44 J. Urban L. 11 (1966) 20

Cowen, *What is Left of the Tenth Amendment?,* 39 N.C. L. Rev. 154 (1961) 19

The Federalist No. 45 (Mentor ed. 1961) (J. Madison) 21

Going Broke The New York Way, FORTUNE, August 1975, at 144 12

H.R. 77, 94th Cong., 1st Sess. (1975) 17

H.R. 2320, 94th Cong., 1st Sess. (1975) 17

H.P. 9137, 94th Cong., 1st Sess. (1975) 17

H.R. 10130, 94th Cong., 1st Sess. (1975) 17

Letter from Simon E. Sobeloff to Governor Theodore R. McKeldin, Oct. 29, 1951, in The Maryland Budget System, First Interim Report, Commission on Administrative Organization of the State of Maryland (1951) 19

Massachusetts Fears Own Default, The Washington Post, November 2, 1975, at A-3, cols. 1-4 12

H.S. Miles, The Maryland Executive Budget System (1942) 10

Note, *State Enforcement of Federally Created Rights,* 73 Harv. L. Rev. 1551 (1960) 15

Note, 28 Md. L. Rev. 395 (1968) 10, 13

Public Employees vs. The Cities, BUSINESS WEEK, July 21, 1975, at 50 12

PAGE

Report of the Commission on Economy and Efficiency on a Budget System (Goodnow Commission Report), Maryland Senate Journal 129-34 (1916) 10

TIME, October 20, 1975, at 9-18 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL.,
Appellants,

v.

JOHN T. DUNLOP, SECRETARY OF LABOR,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT, STATE OF MARYLAND

OPINION BELOW

The Order, Findings, and per curiam Opinion of the United States District Court for the District of Columbia, Civil Action No. 74-1812 (Dec. 31, 1974), are unreported. They may be found reprinted in the Appendix to the Brief for Appellants.

JURISDICTION

Because this is an appeal from a decision of a three-judge District Court, this Court's jurisdiction to entertain the appeal is predicated upon 28 U.S.C. § 1253.

QUESTIONS PRESENTED

The questions presented by this appeal are those stated and discussed in the Brief for Appellants. This Brief for Appellant, State of Maryland, does not present any additional questions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent federal statutes and constitutional provisions bearing upon this case are set forth in the Brief for Appellants. The two sections of the Maryland Constitution which will be referred to in this Brief are:

Maryland Constitution, Article III, Section 32:

> No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law; and every such Law shall distinctly specify the sum appropriated, and the object, to which it shall be applied . . . .

Maryland Constitution, Article III, Section 52:

> (1) The General Assembly shall not appropriate any money out of the Treasury except in accordance with the provisions of this section.
>
> (2) Every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter provided.
>
> (3) On the third Wednesday in January in each year, (except in the case of a newly elected Governor, and then not later than ten days after the convening of the General Assembly), unless such time shall be extended by the General Assembly, the Governor shall submit to the General Assembly a Budget for the next ensuing Each Budget shall contain a complete plan of proposed expenditures and estimated revenues for said fiscal year and shall show the

> estimated surplus or deficit of revenues at the end of the preceding fiscal year. Accompanying each Budget shall be a statement showing: (a) the revenues and expenditures for the preceding fiscal year; (b) the current assets, liabilities, reserves and surplus or deficit of the State; (c) the debts and funds of the State; (d) an estimate of the State's financial condition as of the beginning and end of the preceding fiscal year; (e) any explanation the Governor may desire to make as to the important features of the Budget and any suggestions as to methods for reduction or increase of the State's revenues.
>
> (4) Each Budget shall embrace an estimate of all appropriations in such form and detail as the Governor shall determine or as may be prescribed by law, as follows: (a) for the General Assembly as certified to the Governor in the manner hereinafter provided; (b) for the Executive Department; (c) for the Judiciary Department, as provided by law, certified by the Comptroller; (d) to pay and discharge the principal and interest of the debt of the State in conformity with Section 34 of Article 3 of the Constitution, and all laws enacted in pursuance thereof; (e) for the salaries payable by the State and under the Constitution and laws of the State; (f) for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article 8 of the Constitution and with the laws of the State; (g) for such other purposes as are set forth in the Constitution or laws of the State.
>
> (5) The Governor shall deliver to the presiding officer of each House the Budget and a bill for all the proposed appropriations of the Budget classified and in such form and detail as he shall determine or as may be prescribed by law; and the presiding officer of each House shall promptly cause said bill to be introduced therein, and such bill shall be known as the "Budget Bill." The Governor may, with the consent of the General

Assembly, before final action thereon by the General Assembly, amend or supplement said Budget to correct an oversight, provide funds contingent on passage of pending legislation or, in case of an emergency, by delivering such an amendment or supplement to the presiding officers of both Houses; and such amendment or supplement shall thereby become a part of said Budget Bill as an addition to the items of said bill or as a modification of or a substitute for any item of said bill such amendment or supplement may affect.

(5a) The Budget and the Budget Bill as submitted by the Governor to the General Assembly shall have a figure for the total of all proposed appropriations and a figure for the total of all estimated revenues available to pay the appropriations, and the figure for total proposed appropriations shall not exceed the figure for total estimated revenues. Neither the Governor in submitting an amendment or supplement to the Budget Bill nor the General Assembly in amending the Budget Bill shall thereby cause the figure for total proposed appropriations to exceed the figure for total estimated revenues, including any revisions, and in the Budget Bill as enacted the figure for total extimated revenues always shall be equal to or exceed the figure for total appropriations.

(6) The General Assembly shall not amend the Budget Bill so as to affect either the obligations of the State under Section 34 of Article III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools or the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; and the General Assembly may amend the bill by increasing or diminishing the items therein relating to the General Assembly, and by increasing or diminishing the items therein relating to the judiciary, but except as hereinbefore specified, may

not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during his term of office; and such bill, when and as passed by both Houses, shall be a law immediately without further action by the Governor.

. . . .

(8) Supplementary Appropriation Bill. Either House may consider other appropriations but both houses shall not finally act upon such appropriations until after the Budget Bill has been finally acted upon by both Houses, and no such other appropriation shall be valid except in accordance with the provisions following: (a) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called herein a Supplementary Appropriation Bill; (b) Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be levied and collected as shall be directed in said bill; (c) No Supplementary Appropriation Bill shall become a law unless it be passed in each House by a vote of a majority of the whole number of the members elected; and the yeas and nays recorded on its final passage; (d) Each Supplementary Appropriation Bill shall be presented to the Governor of the State as provided in Section 17 of Article 2 of the Constitution and thereafter all the provisions of said section shall apply.

. . . .

STATEMENT OF THE CASE

The Appellant State of Maryland joins in the Statement which appears in the Brief for Appellants.

INTRODUCTORY STATEMENT

By submitting this Brief, the State of Maryland, one of the Appellants in this case, seeks to demonstrate some of the practical difficulties which an affirmance of the decision below would spawn. The specifics discussed herein pertain only to the State of Maryland, although the thrust of many of the arguments advanced might be applicable to her Sister State Appellants as well. By filing this supplementary Brief, Maryland does not in any manner withdraw her support from the arguments presented in the Brief for Appellants.

ARGUMENT

The District Court recognized in its opinion that "there is evidence that the impact of the 1974 [Fair Labor Standards Act (FLSA)] Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances . . . ." The relatively narrow purpose of this Brief is to demonstrate the validity of this observation *vis-á-vis* the State of Maryland, and to urge that its correctness is not solely of practical interest, but of constitutional import as well.

In 1916, upon the ratification of an amendment to the State Constitution, Maryland adopted an Executive Budget System. A true appreciation of this System can best be achieved by understanding the budget mechanism which the Executive Budget System replaced. The Court of Appeals of Maryland traced the pre-1916 budget system in *Panitz v. Comptroller of the Treasury*,

247 Md. 501, 505-06, 232 A.2d 891, 893-94 (1967), an opinion authored by Chief Judge Hammond.

> The situation in Maryland before the establishment of the executive budget system by amendment of the Constitution was well described by the late Hooper S. Miles, long Treasurer of Maryland, in his essay, The Maryland Executive Budget System. He said (pages 8 and 9):
>
> > 'It was customary, under the former method, for the Governor to appear in person before a joint meeting of the members of the House of Delegates and the Senate, at the beginning of every regular session of the Legislature, and to address them on "the condition of the State," — in the course of which he was expected to direct their attention to the essential needs of the State, and to specifically recommend to their consideration such measures as he judged necessary. Having thus discharged the responsibility imposed upon him by the Constitution, the Governor must thereafter await the final disposition of his recommendations by the Legislature, whose members were free to adopt, alter or entirely ignore any or all of them, except in so far as the Governor, by virtue of his prestige and his influence with the members of the Legislature, might affect the course of his recommendations through the Legislature.
> >
> > 'It is true, the Governor then had the "power to disapprove of any item or items of Bills making appropriations of money" and to thus void the items which he disapproved. However, his use of this veto power on individual items had to be exercised with rare discrimination and with an intimate understanding of the temper of the Legislature, to avoid the danger of antagonizing powerful groups in the Legislature, and thereby jeopardize all of his recommended measures. * * * *

'The power to fix the fiscal policies and determine the course of the fiscal operations of the State was, therefore, exclusively vested in the Legislature, subject only to the mild restraint of the limited veto powers of the Governor, and whatever power of persuasion he might be capable of exercising with individual members of the Legislature.

'The old method often witnessed "log-rolling" or "you help me and I'll help you" tactics among many of the members of the Legislature in their efforts to insure passage of the particular appropriations in which they had some selfish or political interest. It was not unusual for excessive appropriations to result from such tactics and also from the pressure of political and professional lobbyists; and, almost as frequently, some of the most important activities or needs of the State were either overlooked or sadly neglected in what was commonly termed, the "Pork Barrel" scramble.'

In 1916 this "old method" was significantly altered. "To correct the fiscal dilemma of the State and to prevent its recurrence the Legislature proposed and the voters approved a constitutional amendment which now is embodied in the Constitution as § 52 of Art. III," *Panitz v. Comptroller of the Treasury, supra,* 247 Md. at 507, 232 A.2d at 894. The single most important feature of this amendment is that it prohibits the General Assembly[1] from appropriating any funds except by way of an appropriation bill. Such an appropriation bill must either be a Budget Bill or a Supplementary Appropriation Bill, Md. Const. art. III, § 52(2), as those Bills are defined in Md. Const. art. III, §52(s), (8).

[1] "General Assembly" and "Legislature" are used interchangeably.

Section 52 may be summarized generally as follows: The Governor must prepare and submit to the Legislature a budget containing a complete plan of estimated income and proposed expenditures for the ensuing fiscal year, including specified mandatory appropriations such as those for the General Assembly, the judiciary and the servicing of the State debt. The Legislature cannot increase any of the appropriation items set out in the budget (other than those for the judiciary and the General Assembly) but it can strike out or reduce items therein other than those for the State debt, the judiciary, the provisions made by law for the establishment and maintenance of the public schools, and the payment of salaries required to be paid by the Constitution. After the Budget Bill has finally been acted upon by both houses, additional appropriations may be made by a majority of the Legislature provided:

> (a) 'Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose * * *.'
>
> (b) Each such appropriation bill 'shall provide the revenue necessary to pay the appropriation thereby made [by] a tax, direct or indirect, to be levied and collected as shall be directed in said bill.'
>
> (c) Each such bill is, however, subject to the right of the Governor to veto it, in accordance with the provisions of Section 17 of Article 2 of the Constitution.

Panitz v. Comptroller of the Treasury, supra, 247 Md. at 508, 232 A.2d at 894-95.

Maryland's Executive Budget System may be neatly summarized as follows:

> Section 52 of Article III provides for an executive budget plan whereby the Governor is required to submit a *complete plan* of proposed expenditures

> and estimated revenues (the budget), along with a bill for all proposed appropriations of the budget (the budget bill). The General Assembly cannot increase any of the items in the budget bill, other than those for the judiciary and the General Assembly,[2] but it can strike out or reduce items contained therein, except those for the state debt, for public schools, for payment of certain salaries, and for the judiciary.

Note, 28 Md. L. Rev. 395, 396 (1968) (footnote omitted). *See also* H.S. Miles, The Maryland Executive Budget System 10-12 (1942); Report of the Commission on Economy and Efficiency on a Budget System (Goodnow Commission Report), Maryland Senate Journal 129-34 (1916).

With respect to this case, the salient characteristic of the Executive Budget System is the imposition of the primary responsibility for controlling Maryland's fiscal policies and operations upon the Governor in such a manner that he is vested with almost total control over the extent of the total appropriations which the Legislature may make. *See generally* H.S. Miles, The Maryland Executive Budget System 10, 11 (1942). The Legislature may reduce items contained in the Governor's Budget Bill, but may not increase them, Md. Const. art. III, §52(6). This makes it impossible for the

[2] "Items proposed by the Governor in his Budget Bill may be reduced or eliminated by the legislature, but no new item may be introduced by amendment to the Budget Bill; only a Supplementary Budget Bill is permitted to be used for this purpose and it must provide a tax to raise the necessary revenue," McKeldin v. Steedman, 203 Md. 89, 98, 98 A.2d 561, 564 (1953). A third method of appropriating funds is provided for in Md. Const. art. III, §52(14). This is limited to use during special sessions of the General Assembly, which may be convened by the Governor, and are known as emergency appropriations. *See* Note, 28 Md. L. Rev. 395, 397 (1968).

Legislature to alter the Budget Bill so as to create a deficit. *See McKeldin v. Steedman*, 203 Md. 89, 97, 98 A. 2d 561, 564 (1953).[3] Neither may the Governor submit an unbalanced Budget or Budget Bill, nor may he amend them to produce a deficit budget. *See* Md. Const. art. III, §52(5a). Thus, with respect to the State's fiscal policies "Maryland is a 'strong Governor' State," *Hughes v. Maryland Committee for Fair Representation*, 241 Md. 471, 512, 217 A.2d 273, 297 (1966) (Barnes, J., dissenting).

The 1974 FLSA Amendments purport to dictate certain wages, hours, and other conditions of employment, for many more State and local government employees than did the 1966 FLSA Amendments sustained in *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017 (1968). It is primarily to the wage setting and conditions of employment aspects of the 1974 FLSA putsch that this Brief is directed.

Employees of the State of Maryland are, of course, paid by the State. Provision for their compensation is made in the Governor's Budget and Budget Bill every year, which are reviewed during the annual legislative session. With the exception of certain salaries which the Constitution requires to be paid,[4] Md. Const. art. III, §52(6), the salaries paid to State employees may, and usually do, change each year. Furthermore, because the Maryland General Assembly is constitutionally con-

[3] The Legislature cannot precipitate a deficit in any fashion because if it enacts a Supplementary Appropriation Bill it must also enact a revenue raising measure to finance it. *See* Md. Const. art. III, §52(8).

[4] *E.g.*, Md. Const. art. II, §21 (prescription of Governor's salary).

strained to holding one annual 90-day session, Md. Const. art. III, §§14, 15(1), if the FLSA was amended by Congress at a time when the Legislature was not meeting, it would be impossible for Maryland to comply with such a revision until the next session convened. These yearly fluctuations, together with a seasonal Legislature, enhance the likelihood that any given Budget could provide less monies for salaries than the FLSA of 1938, as amended, call for, which, in turn, would lead to the enforcement of the Act against the State. Such enforcement proceedings would present many intriguing dilemmas.

Suppose that the Governor, by inadvertence or otherwise, did not allow for enough funds in his Budget Bill to pay State employees in accordance with the FLSA. Picture not a callous Governor, insensitive to the wants and desires of public employees. Rather, envision a conscientious Governor, faced with the difficulty of allocating a State's limited resources in such a manner as to satisfy a maximum number of his State's important, and almost unlimited, needs. The fact that financial means available to States and municipalities are not unbounded, while always true, has become strikingly evident of late.[5]

The Legislature is powerless to increase an appropriation appearing in the Governor's Budget Bill, Md. Const. art. III, §52(6). If the Legislature wished to

[5] Witness New York City's current fiscal plight, and, what perhaps could become even more disturbing, the monetary problems of the Commonwealth of Massachusetts. *See, e.g.*, TIME, October 20, 1975, at 9-18; *Going Broke The New York Way*, FORTUNE, August 1975, at 144; *Public Employees vs. The Cities*, BUSINESS WEEK, July 21, 1975, at 50; *Massachusetts Fears Own Default*, The Washington Post, November 2, 1975, at A-3, cols. 1-4.

comply with the FLSA by enacting a Supplementary Appropriation Bill, it would have to enact a specific revenue raising measure to support it, Md. Const. art. III, §52(8)(b).[6] Even if such supplementary legislation was passed, the Governor could then veto it, Md. Const. art. III, §52(8)(d); Md. Const. art. II, §17.[7] Or, the situation could arise where the Governor allocates adequate funds in the Budget Bill to meet the FLSA, but the Legislature votes for a reduction below the minimum compliance level, Md. Const. art. III, §52(6). Either way, the question which would eventually have to be faced is how could a remedy be effected?

Under these circumstances, 29 U.S.C. §215(a)(2), making it unlawful to violate the minimum wage provisions of the Act, and the penalty provisions of 29 U.S.C. §216(a), (b), would be brought into play. For violation of the FLSA, section 216(a) provides for maximum penalties of a $10,000 fine and six months imprisonment. Section 216(b) makes an employer violating the minimum wage provisions of sections 206

[6] Whether one such Supplementary Appropriation Bill could pass constitutional muster if it was designed to raise additional funds to pay different types of employees is questionable in light of Md. Const. art. III, §52(8)(a), which requires such Bills to be "limited to some single work, object or purpose." *See* Panitz v. Comptroller of the Treasury, 247 Md. 501, 232 A.2d 891 (1967); Mayor & City Council v. O'Conor, 147 Md. 639, 128 A. 759 (1925); Note, 28 Md. L. Rev. 395 (1968).

[7] A Maryland Governor, unlike the President of the United States, is not always confronted with the all or nothing choice of vetoing or approving a piece of legislation in its entirety. In the case of "Bills making appropriations of money embracing distinct items," the Governor is vested with the power of vetoing individual items. *See* Md. Const. art. II, §17.

and 207 liable to the affected employees in the amount of unpaid minimum wages plus an equal sum as liquidated damages.

Could the Governor be fined or imprisoned pursuant to section 216(a) if his Budget Bill or veto was determined to have caused a violation of the Act? Could the entire Legislature be jailed or assessed if its reduction of an item in the Budget Bill brought about a violation? If so, would the penalty be imposed on the whole body or just upon individual members who voted the reduction?

Section 216(b) accords aggrieved employees the right to maintain suit for double damages "in any court of competent jurisdiction." Surely such a suit could not be maintained in federal court because of the Eleventh Amendment's prohibition of such litigation. Suits by private parties which seek "to impose a liability which must be paid from public funds in the state treasury [are] barred by the Eleventh Amendment," *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 1356 (1974). *See also Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 93 S. Ct. 1614 (1973) (Eleventh Amendment bars employee federal court FLSA suits against employer-States). No amount of congressional intent to the contrary can overcome this proscription. The Constitution, *per force*, has been held to prevail over statutes since 1803, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), if not earlier.[8]

[8] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 398-400 (1798) (Iredell, J.); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); *cf.* Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).

Resort to the Maryland courts would prove valueless because of the sovereign immunity which the State enjoys in its own tribunals, *Charles E. Brohawn & Bros., Inc. v. Board of Trustees*, 269 Md. 164, 304 A.2d 819 (1973). Admittedly, this is a question which this Court did not reach or dispose of definitively in *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, supra*, 411 U.S. at 287, 93 S. Ct. at 1619, but prior decisions indicate that the assertion is accurate. In *Testa v. Katt*, 330 U.S. 386, 394, 67 S. Ct. 810, 814-15 (1947), this Court held that an action on a federal statute could be maintained in Rhode Island's courts where the circumstances were such that a similar "claim arising under Rhode Island law would be enforced by that State's courts." If the law of Maryland did not provide for a similar action, the State courts would not have to enforce the federal FLSA according to *Testa v. Katt, supra. See also* Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551, 1555 (1960).[9]

The Secretary of Labor, as the alter ego of the United States, is not constitutionally prohibited from enforcing the FLSA by initiating a lawsuit against a State in federal court, *Brennan v. Iowa*, 494 F.2d 100 (8th Cir. 1974). However, although he possesses the apparent statutory authority to sue for money damages, 29

[9] *But see* Clover Bottom Hosp. & School v. Townsend, 513 S.W.2d 505 (Tenn. 1974), *appeal dismissed*, 95 S. Ct. 2410 (1975) (decided without benefit of any *Testa v. Katt* analysis or mention of Tennessee's law on the subject).

U.S.C. §216(c),[10] such a monetary recovery would run roughshod over the Maryland Constitution. In order to satisfy the judgment, funds would have to be withdrawn from the State Treasury in direct violation of the provision of the Maryland Constitution which states that "[n]o money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law," Md. Const. art. III, §32. If the State Treasurer or Comptroller made such a withdrawal, he would be acting in violation of his oath of office and constitutionally imposed duties, Md. Const. art. VI, §§2, 3.

Whether or not a finely delineated path through the constitutional jungles could be located and followed to a point where Maryland's constitutional provisions would be set aside is not the central point of this argument. It is one thing for the Constitution of the United States to take precedence over an isolated, detachable provision of a State constitution in the proper case, *e.g., Reitman*

[10] Quaere whether this apparent authority is capable of withstanding constitutional challenge. The Secretary of Labor, under certain circumstances, is clothed with the discretionary power of suing to recover an amount claimed due under the FLSA. However, the statute further provides that any such monies recovered "shall be paid" to the employees affected, 29 U.S.C. §216(c). Although the United States may maintain federal lawsuits against States without violating the Eleventh Amendment, United States v. Mississippi, 380 U.S. 128, 85 S. Ct. 808 (1965), where the United States unabashedly stands precisely in the shoes of a private citizen and maintains a suit for money damages against a State, which, if successful, would require any recovery to be paid to that citizen, it would seem highly questionable, if not absurd, to contend that the Eleventh Amendment could be circumvented by such a thinly veiled statutory assignment of rights. It is not difficult to foresee how such a device could transform the Eleventh Amendment into a nullity. Certainly United States v. Mississippi, *supra*, does not sanction any such legerdemain.

v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627 (1967). It is quite another to employ a mere statute of, to say the least, dubious constitutionality, to abrogate many intertwined constitutional provisions with the result that a State's complex budgetary mechanism can be made a shambles at the federal government's whim.

Similarly, although the State of Maryland does not wait apprehensively for the imminent arrest of its Governor or the members of its General Assembly by federal marshals, if the FLSA Amendments of 1974 are allowed to stand, and if *Maryland v. Wirtz, supra*, is extended, the eventuality could arise. That this is not hysterical speculation may be gleaned from an examination of certain bills currently pending before Congress. *See, e.g.*, H.R. 10130, 94th Cong., 1st Sess. (1975) (A bill which provides for automatic increases in the minimum wage rate, and requires an overtime rate two and one-half times the regular wage rate.); H.R. 9137, 94th Cong., 1st Sess. (1975) (A bill which would deny States any funds under the State and Local Fiscal Assistance Act of 1972, 85 Stat. 191 (1972), if a State does not satisfy the Secretary of the Treasury that it is in compliance with the FLSA of 1938.); H.R. 2320, 94th Cong., 1st Sess. (1975) (A bill which would amend the Internal Revenue Code "to prohibit States from denying unemployment compensation to individuals who are unavailable for work because of temporary illness."); H.R. 77, 94th Cong., 1st Sess. (1975) (A bill which provides that State and municipal employees shall be subject to the National Labor Relations Act, which would, *inter alia*, entitle them to bargain collectively.). Regrettably, many of the fears expressed by the dissenting Justices in *Wirtz* have been borne out since 1968, *Maryland v. Wirtz, supra*, 392 U.S. at 201-05, 88 S. Ct. at 2026-28 (Douglas, J., dissenting). Fortunately,

however, the States do not appear before this Court armed only with policy arguments over the wisdom *vel non* of the FLSA of 1938, or of the 1974 Amendments. Indeed, such debate is inappropriate in this tribunal. It is the Tenth Amendment to the Constitution of the United States which, as is fully expounded in the Brief for Appellants, provides the legal elixir for the States, and demands that they prevail in this appeal.

"Among the states Maryland was a pioneer in inaugurating [the Executive Budget System] for controlling appropriations, and its example has been followed quite generally throughout the nation," *McKeldin v. Steedman, supra,* 203 Md. at 99, 98 A.2d at 564-65 (Sobeloff, C.J.). It is the constitutional design of the System to assure that Maryland's fiscal requirements cannot be enlarged beyond those fixed in the Governor's Budget. Although not inflexible, this assurance is effectively secured through operation of the System's "key idea . . . that legislators will be less facile in passing Supplemental Appropriation bills if they must in the same act assume the uncongenial task of directing a specific tax," *id.* at 99, 98 A.2d at 565.[11] If the safety mechanisms which are built into the Budget System can be obliterated by application of the 1974 Amendments to the FLSA, Maryland's fiscal integrity will be severely jeopardized.

The importance of a sound fiscal system to the well being of good State government cannot be minimized.

---

[11] "The clear insistence of Section 52 that the *onus* of imposing a tax shall go hand in hand with the granting of public monies is not based upon abstract political theory but is the result of the State's alarming experiences under the practice of legislatively-initiated appropriations which flourished without restraint before the Budget Amendment," McKeldin v. Steedman, *supra,* 203 Md. at 100, 98 A.2d at 565.

In 1951, Simon E. Sobeloff,[12] Chairman of the Commission on Administrative Organization of the State of Maryland, wrote to Maryland Governor McKeldin in the transmittal letter accompanying the Commission's First Interim Report, titled "The Maryland Budget System":

> Money, the life blood of all governmental operations, is being taken from our people in ever increasing amounts by the taxing processes of the State and of other governmental units. The public welfare as well as sound public morals requires that this money be wisely and frugally spent. A good budget system is an essential means not only to allocate monies to particular purposes but also to exercise control over spending agencies to assure that funds shall be spent as intended and in an efficient manner. Budgeting for large scale operations, whether in business or in government, requires the proper use of intricate technical devices.

Letter from Simon E. Sobeloff to Governor Theodore R. McKeldin, Oct. 29, 1951, in The Maryland Budget System, First Interim Report, Commission on Administrative Organization of the State of Maryland 3 (1951).

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. It "stands as a constant reminder that the states were not intended to deteriorate into historical oddities," Cowen, *What is Left of the Tenth Amendment?,* 39 N.C. L. Rev. 154, 183 (1961).

---

[12] Later Chief Judge of the Court of Appeals of Maryland, 1952-54; Solicitor General of the United States, 1954-56; United States Circuit Judge, 1956-73.

Mr. Justice Brennan has written that "the possibilities for collision between government activity and individual rights will increase as the power of government itself expands, and this growth in turn heightens the need for constant vigilance at such collision points," Brennan, *Extension of the Bill of Rights to the States,* 44 J. Urban L. 11, 21 (1966). This case presents a collision between an overexpansion of federal activity and the rights of the individual States. To paraphrase Mr. Justice Brennan, "if federalism is to endure, those who govern must recognize the integrity of the States and accept the enforcement of constitutional limitations on their power," *id.* This cannot be accomplished if the States are compelled to adhere to the 1974 Amendments under the threat of injunctive and criminal sanctions. *See Maryland v. Environmental Protection Agency,* No. 74-1007 (4th Cir., decided Sept. 19, 1975). National legislation may impose weighty burdens upon private enterprise which may be so stringent as to command such an entity to close its doors. *See* National Prohibition Act (Volstead Act), 41 Stat. 305 (1919), *repealed,* Act of August 27, 1935, 49 Stat. 872 (1935). However, regulating private businesses and attempting to control a State's governmental apparatus are two entirely distinct propositions. The "business" of States is State government. Government is the *raison d'ètre* of the States, and they have the constitutional right and duty to conduct their internal operations as they see fit.

> The powers delegated by the proposed Constitution to the federal government are *few* and defined. *Those which are to remain in the State governments are numerous and indefinite.* The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (Mentor ed. 1961) (J. Madison) (emphasis supplied).

The 1974 Amendments to the FLSA represent an unconstitutional encroachment on the rights reserved to the States by the Tenth Amendment.[13] The idea that the end justifies the means has no place in our constitutional law. Mr. Justice Stone once characterized the Tenth Amendment as a "truism," *United States v. Darby,* 312 U.S. 100, 124, 61 S. Ct. 451, 462 (1941). But it is more than that. A few years before, Mr. Chief Justice Hughes delved more deeply into the Tenth Amendment's prominent position in our federal system in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 528-29, 55 S. Ct. 837, 842-43 (1935):

> The Constitution established a national government with powers deemed to be adequate . . . but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

---

[13] "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 n.4 (1938).

CONCLUSION

For the reasons expressed herein, and in the Brief for Appellants, the 1974 Amendments to the Fair Labor Standards Act of 1938, insofar as they purport to apply to the States, cannot survive constitutional scrutiny. Accordingly, the Order of the District Court must be reversed, and the declaratory and injunctive relief prayed for below granted.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
HENRY R. LORD,
Deputy Attorney General,
GLENN E. BUSHEL,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
Attorneys for Appellant,
State of Maryland.

November 1975